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Innocent Victims

EVERYONE has sympathy with the suggestion made in *The Times* earlier this week for compensating out of public funds the victims of violent crimes on the same scales as those prescribed for the purposes of the National Insurance (Industrial Injuries) Acts. It would indeed be a fitting memorial to the late Miss Margery Fry to establish a scheme such as she had worked out. Without being cold-blooded we would point out that crime is not the only way in which an innocent person can be killed or maimed. It is natural that there should be widespread public sympathy for the widow and children of a man who is murdered, especially when they have no practicable means of recovering any financial compensation for his death. Likewise, a man or woman can be disfigured or disabled for life without any prospect of compensation. Nevertheless, if any change is to be made in the law we think that it would be more consistent and reasonable to have regard to the condition of the person injured and of the dependants of a person killed and not to the method by which the injury or death was caused. Every year many tragedies happen, difficult to enumerate, the victims of which are not entitled either to damages or to benefits under the Industrial Injuries Acts. There are pedestrians who are unable to prove negligence on the part of the drivers of vehicles which knock them down, passengers in cars or on motor cycles who are not covered by compulsory insurance, children at school who meet with an accident which is for practical purposes unavoidable, people who suffer accidents in the home (one of the most dangerous places to be in, according to statistics), and even the owners of businesses whose employees, if injured, would be entitled to benefit from the industrial injuries fund. It would be a sound plan to review the whole situation.

First Offenders

THE purpose of the First Offenders Bill, which was given a third reading in the Commons last week with the support of the Home Office, is to make magistrates think twice before sending adult first offenders to prison in the same way as, since 1948, they have had to think twice with regard to juvenile offenders. No one supposes, however, that the Bill can have any more than a superficial effect on the intractable problem of crime. In spite of all the effort and good intentions of the past years we seem to be as far away as ever we were from penetrating to the root of the trouble. A few weeks ago the HOME SECRETARY reminded us that no longer can poverty be regarded as one of the principal causes of crime. The feckless types who shuffle in and out of the dock at quarter

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sessions are not precisely stupid, although if they were a little more intelligent they would never be caught. Alternatively, if they were a little more intelligent they would not commit crimes. We agree with one of the solicitors who took part in last week's debate, Mr. BARNETT JANNER, when he said that when the Bill had been passed the probation service must be extended. The Bill is not designed to prohibit the imprisonment of first offenders: there are presumably some for whom it is suitable, but it is not always easy for magistrates to make the proper choice. It is possible that suspended sentences might be a way out of the difficulty.

Damages for Injurious Grief

DAMAGES, GLYN-JONES, J., decided in *Forbat* v. *C. T. Olley and Sons* (*Erith*), *Ltd.*, on 1st May, are not recoverable in respect of distress or depression suffered as a result of losing one's wife. The plaintiff had sued on behalf of himself and his wife's estate in respect of injuries to himself and of the death of his wife owing to the alleged negligent driving of the defendant's servant. After the accident, his lordship said, the plaintiff changed from a very happy man to a moody and irritable one, and had attempted to take his life with sleeping tablets. It was not surprising that the survivor of a devoted couple grieved so long and so sincerely over the loss of his spouse as to be brought to a state of extreme depression. It would not be the first time that a bereaved spouse had made an attempt on his or her life. The plaintiff had suffered agonising emotional distress, but he was not entitled to compensation for it. We respectfully submit the view that this case is at least near the border-line, especially where, as the learned judge said, it is not surprising that injurious grief follows on the loss. Such grief would thus be a natural and probable result of the negligence, within the *Hadley* v. *Baxendale* rule, and in those circumstances would not be too remote to be recoverable. This would, we submit, be a very different item of damages from that of loss of *solatium*, which has been held to be irrecoverable except in very special circumstances, because its essence is that it causes, and may be expected to cause, mental hurt or injury which will vary from one individual to another, but which can be medically recognised.

For the Sake of a Child

IN rather unusual circumstances the Court of Appeal were recently asked to allow a petition for dissolution to be presented within three years of the date of marriage. Section 2 of the Matrimonial Causes Act, 1950, provides that the court may give such leave where the petitioner is able to show exceptional depravity on the part of the respondent or that he (the petitioner) has suffered exceptional hardship. In this particular case the wife was expecting a child by a man who was to be made co-respondent and the husband made his application to enable them to marry before the child, who would otherwise have been illegitimate, was born. Leave was given on the ground of exceptional hardship, and this decision may well seem to be a little surprising until it is remembered that the principal determining factor in applications of this kind is whether there is any possibility of there being a reconciliation. The petition was duly presented and WILLMER, J., granted a decree *nisi*. Section 12 (1) of the Act of 1950, as modified by the Matrimonial Causes (Decree Absolute) General Order, 1957, stipulates that a decree *nisi* is not to be made absolute within three months of the granting of the decree unless the court shall fix a shorter time, and his lordship thought that this was a proper case in which to have the decree absolute expedited, subject to the consent of the Queen's Proctor. This decision was made within a fortnight of the original application for permission to file a petition within three years of the date of marriage.

Notice of Intended Prosecution

WHERE a person is prosecuted for exceeding one of the speed limits or for reckless or dangerous or careless driving, he is not to be convicted unless (*a*) he was warned at the time of the commission of the offence that a prosecution was being contemplated, (*b*) a summons was served on him within fourteen days, or (*c*) within this period a notice of intended prosecution giving particulars of the alleged offence was served on him or sent to him by registered post (s. 21 of the Road Traffic Act, 1930). Certain other offences were added to the list by the Road Traffic Act, 1956. In a recent case before the Divisional Court it appeared that a notice of intended prosecution had been duly sent to the accused by registered post but he did not receive it because he was away on holiday. The notice was subsequently served on him personally, but more than fourteen days after the commission of the alleged offence, and in these circumstances the court held that the Act had not been complied with and that for this reason the appeal against the magistrate's decision acquitting the accused should be dismissed. If anything, this decision goes a little further than that in *Holt* v. *Dyson* [1951] 1 K.B. 364, where it was held that a notice under s. 21 sent by registered post to the defendant's home address while, to the knowledge of the police, she was in hospital, had not been properly served. In each case it is a question of whether the police acted reasonably, and in the recent case they did not even make inquiries as to the whereabouts of the accused.

The Law of the Sea

JUDGING by all accounts, the recent conference at Geneva on territorial waters and fishing rights was a frustrating affair. Since only a small minority of our readers have any direct contact with this branch of the law, romantic though it may be, it is enough if we content ourselves with recording that no proposal before the conference received the necessary two-thirds majority, so that at first sight we are where we were. Commander NOBLE has said that we shall continue to recognise the three-mile limit: this is all very well, but we assume that other countries will take a different view, a situation which will in due course give rise to some conflict of laws. The difficulty of achieving international agreement on anything is increasing year by year.

"The Estates Gazette"

OUR distinguished contemporary the *Estates Gazette* was first published on 1st May, 1858, and has issued a fascinating and finely produced special supplement to commemorate the attainment of its centenary. In the first hundred years of its life the *Estates Gazette* has rendered unique service to a variety of professions concerned with the land, and not least to solicitors who, we are sure, are well represented among its subscribers. Over the years it has provided a rich store of otherwise unreported decisions on land law for which the legal profession has particular cause to be grateful. We offer our hearty congratulations to the Editor and Proprietors and wish them all success in maintaining a great tradition.

DIVIDEND STRIPPING

DIVIDEND stripping is a device for withdrawing accumulated undistributed profits from a private company as taxed dividends without liability to sur-tax. The aspect of the operation (as practised before the Finance (No. 2) Act, 1955) to which exception was taken by the Inland Revenue was the creation of an *artificial* loss in respect of which tax relief could be obtained.

Post-war conditions favoured the building up by some companies of a large fund of undistributed profits, partly because of the sellers' market which existed at that time, and partly because of the protection from sur-tax directions enjoyed by many such companies between 1947 and 1957. If the profits, surplus to normal dividend requirements and the needs of the business, were distributed as additional dividends, they would attract further profits tax at the distributed rate and maybe render the recipients liable to a punitive rate of sur-tax. Unless such surplus funds were to be retained in the company there were obvious advantages in withdrawing them in the guise of capital which would not be subject to tax.

Before s. 31 of the Finance Act, 1951, was enacted there was a simple way of doing this; either by capitalising free reserves and then repaying part of the capital or by reducing the capital first and capitalising reserves afterwards. The Act of 1951 made this a costly business.

Creating the artificial loss

Attention was then focused on dividend stripping. Stated simply, the shareholders in a private company with large reserves in cash or quoted investments would agree to sell to a finance company—which holds stocks and shares as part of its stock-in-trade and not as "fixed capital"—their shares in the private company at a price representing the value of the company's trading assets plus the market price of its investments.

After the shares had been transferred to the finance company, the private company would pay to the finance company, out of past accumulated profits, a large dividend less tax at the standard rate which, together with profits tax at the distributed rate on such dividend, would absorb the surplus cash and the quoted investments (which would have been previously realised) of the private company. The finance company would then either sell the shares in the private company back to their former owners at a much reduced price (which gave effect to the depletion of the company's resources by the payment of the dividend and profits tax), or it would proceed to liquidate the private company, the vendors of which would form another private company with the same name to buy back from the liquidator the trading assets of the original company.

From such an operation both parties would gain. The shareholders in the private company would have transferred the surplus profits from the company into their own pockets without incurring any liability to tax. The company, however, would already have paid tax at the standard rate and profits tax at the undistributed rate on those profits, whilst they were retained by the company.

The finance company, on the other hand, would make an artificial "loss" on the purchase and sale back of the private company's shares. If, however, it had made profits on other transactions during the year this loss could be offset against them, which would save tax on those profits. If not, the loss would enable a repayment to be claimed under s. 341 of the Income Tax Act, 1952, against the dividend received. Thus, if the gross dividend were £50,000 and the loss £40,000 the finance company would receive a net dividend of £28,750 (with standard rate tax at 8s. 6d. in the £) and would be able to claim tax relief in respect of the "loss" amounting to £40,000 at 8s. 6d. = £17,000. These two amounts added to the moneys received from the resale of the shares or the proceeds on winding up the original company would normally result in a profit to the finance company on the entire deal. Similar schemes could be operated through charities and superannuation funds exempt from tax.

As usually happens when a tax avoidance device assumes considerable proportions, the Inland Revenue resorted to legislation. Section 4 of the Finance (No. 2) Act, 1955—the legislation in question—does not prohibit such schemes but provides that if the shares are bought after 26th October, 1955, and within six years of the dividend becoming payable, and the dividend is paid out of profits accumulated before the date when the shares were bought, then (saving exceptions) the net dividend is to be treated as a trading receipt which has not borne tax; or, if a charity is the purchaser of the shares, as chargeable to tax.

With the assistance of s. 15 of the Finance Act, 1953, and subject to payment of a higher commission than formerly for the services of the finance company, dividend stripping has continued on a reduced scale as before. Mainly, however, a new technique has been developed.

If a company is burdened with heavy losses, there are three courses open to it: (1) it can go into liquidation, (2) fresh capital can be injected into it in the hope of making profits which will, in time, absorb the losses, or (3) a "marriage" can be arranged between the loss company and a private company which is "full of profits."

Tax loss companies

The marriage between such companies gives rise to another form of dividend stripping. The shareholders in the private company with the large accumulation of profits buy the shares of a company with tax losses which have been agreed with the inspector of taxes. This it is usually able to do at a price which values the loss at between 1s. 6d. and 3s. 6d. in the £. They then lend the tax loss company sufficient money to enable it to buy the shares of the private company at their proper value. The private company then pays the tax loss company a dividend, less tax, large enough to absorb the whole of its losses. Again, tax relief on the losses is claimed against the dividend, and the dividend and the refund of tax enable the loss company to repay its loan from the shareholders.

There is, of course, one essential difference between the two operations. In the first case, an *artificial* loss is created in respect of which tax relief is obtained; in the second case, the losses are *trading* losses which have been actually incurred.

There is also another difference: in the second type of operation the tax is reclaimed earlier than it would be if fresh capital were raised and the company with tax losses had to wait several years while future profits absorbed those losses. Under the old type of dividend stripping the tax would not otherwise have been reclaimed at all.

Clause 16 of the new Finance Bill tightens up s. 4 of, and Sched. III to, the Finance (No. 2) Act, 1955. Clause 17 places a restriction on the relief for losses available under s. 341

of the Income Tax Act, 1952; s. 15 (3) of the Finance Act, 1953; or para. 3 of Sched. III to the Finance Act, 1954. In future, where the shares in a company with accumulated profits have been acquired after 15th April, 1958, the loss company will not be able to pay itself a dividend, less standard rate income tax, out of those profits, and then reclaim the tax deducted on account of its own losses. But the loss company will still be able to obtain relief in respect of future profits.

When the new proposals become law a company which has incurred heavy losses will now have two courses open to it instead of three, and if it decides to continue trading it will clearly take longer to recover its equilibrium. Whether, therefore, the immediate fiscal advantages of the new measures will enure for the long-term benefit of the economy may be open to some doubt. There will be widespread relief, however, that the new restrictions are not being made retrospective to 26th October, 1955, as at one time seemed possible.

K. B. E.

Common Law Commentary

ROCKING THE BOAT

WAS the *Strathcona* case rightly decided? The purchasers of the s.s. *Lord Strathcona* knew that the vendors had granted a charter-party to the Dominion Coal Co., and that that charter-party still had some time to run; the vessel was a coal carrier designed for the Dominion Coal Co., yet the purchasers refused to allow the Dominion Coal Co. to exercise their rights under the charter-party in respect of the vessel after completion of the purchase.

Are not the words taken from *De Mattos* v. *Gibson* (1858), 4 De G. & J. 276, at p. 282, and adopted by the Privy Council in the decision of *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926] A.C 108, most apt? They are:—

> "Reason and justice seem to prescribe that, at least as a general rule, where a man . . . acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use . . . the property for a particular purpose . . . the acquirer shall not, to the material damage of a third person, in opposition to the contract and inconsistently with it, use . . . the property in a manner not allowable to the [transferor]."

The principle of the quotation developed, in regard to land, through *Tulk* v. *Moxhay* (1848), 2 Ph. 774, to the law of restrictive covenants as we now know it. The Privy Council considered that the purchasers of the s.s. *Strathcona* were also within that principle and the decision of *Tulk* v. *Moxhay*, and held that they must allow the Dominion Coal Co. to exercise its rights under the charter-party of which they had notice at the time of purchase.

Old doubts

The decision of the *Strathcona* case has been criticised on the ground that by 1926 when the *Strathcona* case was decided the law which stemmed from *Tulk* v. *Moxhay* had developed considerably and, for example, one of the requirements of a valid restrictive covenant is that it must be for the benefit of adjoining land. There was nothing in the facts of the *Strathcona* case equivalent to "adjoining land" held by the Dominion Coal Co. to entitle them to enforce the charter-party. However, this criticism is itself open to the objection that the development of the law of restrictive covenants in regard to land was conditioned by the nature of the subject-matter and the natural desire to keep legal principles within reasonable limitations. Restrictive covenants are designed to benefit adjoining land and therefore it is not surprising that that factor plays its part. When one attempts to apply the same fundamental principle to ships or goods (is a ship goods?) it does not follow that the same limitations are to be expected, and, with all respect to the learned critics (Messrs. Cheshire and Fifoot), it is not an objection to the *Strathcona* case that the principle of *De Mattos* v. *Gibson* had, in its application to land, developed in a way inapplicable to something which is not land.

Another ground of criticism is that the *Strathcona* case conflicts with the principle of *Taddy & Co.* v. *Sterious & Co.* [1904] 1 Ch. 354 to the effect that conditions cannot be made to run with goods. This principle, however, has been partly eaten into by the provisions of s. 25 of the Restrictive Trade Practices Act, 1956; which, so far as price conditions are concerned, extends to allow such conditions to run. Moreover, *Taddy* v. *Sterious* is a different type of case from the *Strathcona*, in that in the latter case there was express notice of a distinct contract already made, which is not what is aimed at in *Taddy* v. *Sterious*.

New doubts

A new aggressor has now appeared on the battlefield to contend with those (including the writer) who wish to uphold the principle of *De Mattos* v. *Gibson* and the *Strathcona* case. It is the recent decision of *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.* [1958] 2 W.L.R. 551; *ante*, p. 232. In that case Diplock, J., said that the *Strathcona* case was wrongly decided, and that being a Privy Council case it need not be followed. The judgment is worthy of some study, for several pages are devoted to the decision, and the reasons expressed by the Privy Council, together with speculation on matters which may have influenced them, are set out. One of the main objections is that a charterer under a time charter cannot be said to have an "interest" in the vessel, since the time charter is a contract for services. This is possibly the strongest argument put forward yet, but in truth the principle of the *Strathcona* is akin to the tort of inducing a breach of contract, and we may therefore question whether it ought to be necessary to establish any proprietary or possessory rights in the goods over which the dispute arises. The reason why this point is made is that the Privy Council used it to distinguish *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co., Ltd.* [1915] A.C. 847 (in which the House of Lords endorsed the principle of *Taddy* v. *Sterious*). Since the rejection of the principle of *Dunlop* v. *Selfridge* (by the Restrictive Trades Practices Act, 1956) it would be possible to enlarge the *Strathcona* principle.

The facts in *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.* were a little different from *Strathcona*; there was the important similarity that one party had notice that a third party was concerned in regard to the vessel, but he did not have specific

notice of the rights of that third party. Hence it could be said that Diplock, J.'s remarks in regard to the *Strathcona* were *dicta*, for he had this other ground for not following that case (and he did take advantage of the other ground).

The real argument in the case arose out of a requisitioning of the vessel by the Government, and it was directed to answering the question: Who should be entitled to collect the sums payable by the Government in respect of the requisitioning—should the purchaser be entitled to them or the charterer who had a charter-party still current though made not with the purchaser but with the vendor of the vessel?

There was no frustration of the charter-party because the period of requisition was too short in comparison with the length of the chartering and when it commenced it was reasonable to assume that it would be of the period that in fact it was. The claim by the charterers for the requisition money therefore failed. Moreover, it was not a case where, if the *Strathcona* principle had applied, it would have entitled the charterers to claim the money for two reasons: (*a*) it was not by a breach by the defendants that the ship was used inconsistently with their charter, but by a Government action; (*b*) the plaintiffs would only be entitled to an order that the vessel be not used inconsistently with their rights, and not to an order for the money received from the Government. There were further arguments not relevant to this article.

Conclusion

Making a realistic appraisal of the position, we must accept that the *Strathcona* case is no longer reliable. In the first place, it was a Privy Council decision and so not binding on our courts (it was an appeal from Canadian courts). Secondly, it has never been applied in any other case; it has occasionally been mentioned, usually with disapproval. Thirdly, there are text-book arguments against it which, though in no way binding on the courts, do carry weight. Fourthly, in this recent case the learned judge has supported his disapproval with a detailed survey of the case and the reasons behind it.

The boat has certainly been rocked, but it may not be a total loss. The fact remains that if a man buys property knowing that a third party has a right in respect of it, reason and justice *do* prescribe that he should respect that right. If a case arose wherein manifest injustice would (if the right of the third party were ignored) be done to the third party then the *Strathcona* may prove, like the *Tobermory*, to be a source of benefit even though sunken. Salvors might yet bring to the surface again valuable cargo, if not the whole vessel itself.

L. W. M.

ESTATE DUTY: COPING WITH SECTION 55—I

AVOIDING SECTION 55

THE scope of s. 55 of the Finance Act, 1940, which provides for an assets basis of valuation of shares and "debentures" for estate duty, was only slightly narrowed by the Finance Act, 1954, but the accompanying provisions in that Act greatly mitigate the severity of s. 55 in many ways, and can often be invoked to make the estate duty burden even lighter than if the section were not applied. Accordingly, the elaborate provisions of the 1940 Act, incorporating earlier sur-tax provisions and designed to prevent avoidance of s. 55, may be turned to the taxpayer's advantage, or at any rate may make the section no longer the bogey it has been. This aspect will be considered in a second article.

There are still many cases, however, where it is better to avoid s. 55 and this step is still possible, although in most such cases the individual concerned will need to survive the avoiding action by five years, or in some cases just over three years. It is with these cases that the present article is concerned.

Section 55 is one of a number of provisions each of which depends for its application on the company's being what is often called a "close corporation," i.e., one which, broadly speaking, is controlled by not more than five persons. *Prima facie* then the first logical step in seeking to circumvent s. 55 is to consider whether the company can be taken out of that category: once that was achieved it would be unnecessary to examine the provisions peculiar to s. 55. However, it is much easier to circumvent those provisions than to avoid being a close corporation. Very broadly speaking, a company can avoid the category only if, for all the five years preceding the relevant death, its share capital were owned in equal proportion by not less than ten persons, none of whom was the spouse, ancestor, lineal descendant, brother or sister of any of the others. Were that achieved, the danger of s. 55 applying would indeed be remote, unless there were some very unusual provisions in the articles.

Factors affecting application of the section

The more practical approach to a straightforward avoidance of s. 55 is to study the provisions peculiar to that section (as amended). If the person whose death is in contemplation is prepared to abandon entirely his interest in the company there is of course no problem—beyond that of surviving for five years or finding the market value of the shares. Problems arise where he wishes to retain his power or wealth in the company as much as possible and still escape s. 55. The limits on these aspirations are indicated by the following brief summary of what he must avoid:—

(*a*) "Control of the company" at any time (even momentarily) during the statutory five years.

(*b*) A beneficial interest in possession, at any time during the statutory five years, in one half or more of the shares or "debentures," no other person then having control of the company.

(*c*) "Powers equivalent to control" during a continuous period of two years in the five-year period.

(*d*) The right to (or the legal ability to obtain) more than half the dividends or "debenture" interest during a continuous period of two years in the five-year period.

If the individual is within (*a*) or (*b*) and the company has common-form articles, all he has to do is to reduce his holdings to 49 per cent. and survive five years. Having disposed of his voting control, it seems that he might retain powers equivalent to control for not more than, say, another twenty-three months.

But care must be taken that neither the articles relating to voting, nor the shareholdings, are such that the demise of another shareholder, or some other possible event, will give the individual momentary control. Incidentally, if voting control comes about through the casual appointment of the

individual as chairman with a casting vote, the Estate Duty Office will probably not insist on treating that as control for s. 55 purposes, but it is better not to have to rely on any such concession.

If a potential object of the individual's bounty, e.g., a child, niece, or nephew, is about to marry, then a convenient course is to give the excess shares to that person in consideration of the marriage, in which case estate duty is avoided on those shares even if the donor dies next day. Consequently, the question of valuation of the shares will not even arise. If desired, the gift can be made by way of settlement provided the primary trusts are in favour of persons within the marriage consideration and take effect; the possibility of other persons benefiting in default of issue will not forfeit the exemption. The settlor should not be a trustee, as this may jeopardise the scheme.

If marriage consideration is not available, the transferee may be able to raise the market value of the transferred shares and pay it over to the transferor. Of course, such value will still pass on the transferor's death, but it will normally be very much less than a s. 55 valuation of the shares. Where the transfer is to a person who is not a "relative" (in the wide sense laid down by s. 44 (2) of the Finance Act, 1940), then, provided the Revenue can show no element of bounty, the consideration given by the transferee need not be the full value (*Re Fitzwilliam's Agreement* [1950] Ch. 448). The consideration need not in either case be money, but it should be what the transferor genuinely believes to be a fair equivalent of the shares (*A.-G.* v. *Sandwich* [1922] 2 K.B. 500). Where the consideration is only partial, proportionate relief is obtainable.

If the individual is outside (*a*) and (*b*), but within (*c*) or (*d*), it remains to modify the arrangements which bring him within (*c*) or (*d*) and to survive a little over three years. This would not necessarily avoid possible liability under s. 46 of the Finance Act, 1940, but that section is beyond the scope of this article.

Control of the company

The control of a company envisaged in (*a*) above may shortly be described as "voting control." It covers both—

(i) actual voting control as ordinarily understood; and where that is absent,

(ii) the control of *powers* of voting on all questions, or on any particular question, affecting the company as a whole, which if exercised would have yielded a majority of the votes capable of being exercised thereon (Finance Act, 1940, s. 55 (3)).

This "voting control" in (*a*) is to be sharply distinguished from "powers equivalent to control" mentioned in (*c*) and also from (*b*) and (*d*) which are concerned purely with beneficial interests, not powers. For one thing, voting control which the individual had in a fiduciary capacity is ignored unless that fiduciary capacity is imposed by a disposition made by the deceased himself (Finance Act, 1940, ss. 55 (5), 58 (5)).

An individual is deemed to have powers equivalent to control, within (*c*), if he either has the capacity, or could by the exercise of a power with his consent obtain the capacity, to exercise or control the exercise of any of the following powers (Finance Act, 1954, s. 31 (1) (*e*))—

(i) powers of a board of directors;

(ii) powers of a governing director;

(iii) power to nominate a majority of directors or a governing director;

(iv) power to veto the appointment of a director;

(v) "powers of a like nature."

Thus he must avoid being a sole director nor must he have a casting vote where there are only two directors. Again the articles must not be such as to require more than a bare majority for the appointment of a director, if the effect of such a provision is to enable the individual to block new appointments with his minority vote.

The Acts nowhere define what is a governing director. The common-form articles for such an office indicate what the draftsman of the Act had in mind, but it will be prudent to avoid all use of the expression in the articles, no matter how limited the actual powers of the "governing" director in question might be.

As indicated above, the control under (*a*) is to be sharply distinguished from (*b*), (*c*) and (*d*). Where the case falls within (*b*), (*c*) or (*d*) but not within (*a*), s. 55 still does not apply unless one of the two conditions set out in s. 29 (5) of the Finance Act, 1954, is satisfied. The object is to ensure broadly speaking that the assets valuation is not applied to a case outside (*a*) unless the persons in a position to dispose of the deceased's shares are also in control of the company, in the (*a*) or (*c*) sense. The two alternative conditions to be satisfied are—

(i) that immediately after the death, a person having voting control or "powers equivalent to control" (alone or in conjunction with relatives) has a beneficial interest in possession in the shares or debentures; or

(ii) that immediately before and after the death the shares or debentures are held by trustees who have voting control by virtue of shares or debentures held by them as such trustees.

Neither of these two conditions applies if the shares, etc., attract liability as an *inter vivos* gift or under s. 43 of the Finance Act, 1940 (cesser of a limited interest). Instead, the condition for the application of an assets valuation is that, at some time in the period from the date of the gift or cesser to the moment following the death, the donee, etc., had voting control or "powers equivalent to control," either alone or in conjunction with his relatives; "relative" here having the more restricted meaning of "husband, wife, ancestor, lineal descendant, brother or sister" (Finance Act, 1954, s. 31 (1) (*d*)).

Voting control by legatee

For the purpose of determining whether a person (but not apparently the trustees referred to in s. 29 (5)) has voting control, alone or in conjunction with his "relatives" (as defined in s. 31 (1) (*d*)), s. 31 (3) (*a*) requires to be brought into account the votes attached to shares or debentures held in trust, if that person (or a relative of his) in conjunction with that person's relatives is or was at any time entitled to nine-tenths of the income from them. For the same purpose, s. 31 (3) (*b*) requires that shares, debentures, or interests in them, forming part of a person's estate at his death, shall be treated as vesting immediately in the beneficiaries. Section 31 (3) (*b*) applies also for the purpose of determining whether a person has a beneficial interest in possession, for the purpose of s. 29 (5) (see (i) above).

Thus where the shares, etc., are bequeathed outright among two or more people who are not, as it were, within the prohibited degrees of relationship laid down in s. 31 (1) (*d*), e.g., bequests to persons who are not more nearly related to each other than as cousins (their relationship to the deceased is immaterial), then unless the case is within (*a*) (voting control) s. 55 will not normally apply. The testator without voting control may so word his will that ultimate control will speedily pass to one person or to a number of relatives without having

to suffer an assets valuation; for instance, by interposing life interests in favour of some ancient retainers. However, he must beware the anti-avoidance provisions of s. 31 (3) (*c*), which, *inter alia*, empower the Inland Revenue to direct that such limited interests be disregarded. If the limited interest has been granted *bona fide*, and not for the purpose of avoiding s. 55, it is understood that the Inland Revenue will not exercise this discretionary power.

Inter vivos gift to employee, etc.

A restriction on s. 55 similar to those just described is contained in s. 30 (2) of the 1954 Act. In effect, it extends the benefit of s. 29 (5) to a case where the deceased is within (*a*), but only where the shares were the subject of an immediate and absolute *inter vivos* gift to an employee (or former employee) of the company or to his widow or orphan; the donee not being a relative of the donor. A gift of shares to a present employee runs the risk of attracting income tax on their value unless the gift is expressly made in such terms as to preclude any argument that it is an emolument.

Obtaining a stock exchange quotation

Although the cost may be prohibitive for a small company, for a large one there is no better way of avoiding s. 55 than by obtaining a stock exchange quotation—a method which has been frequently adopted, often in conjunction with a scheme to acquire outside finance. Section 55 (4) directs that the section shall not apply to the valuation of shares or debentures of a class as to which—

(i) permission to deal has been granted by the committee of a recognised stock exchange in the United Kingdom; and

(ii) dealings in the ordinary course of business on that stock exchange have been recorded during the year ended with the death.

If these two conditions are fulfilled, even an overwhelming majority holding by the deceased will not attract the assets valuation (although, of course, the possibility of s. 46 liability may remain). Moreover, there is no necessity to survive the granting of the quotation for a longer period than is necessary to allow of two dealings in the ordinary course of business.

However, a quotation is not likely to be granted if at the time of the application the shares are concentrated in one or even two or three holders. Accordingly, it will be necessary for the shares, other than those held by the controlling shareholder, to be spread among a relatively large number of individual holders, say, between fifty and sixty. If the company has a scheme for providing employees with small blocks of shares, the requirement could be met in that way.

The procedure for applying for a placing is set out in the rules and regulations of the stock exchange. It involves the publication of an advertisement containing, *mutatis mutandis*, the information required in a prospectus.

P. E. Whitworth

A Conveyancer's Diary

DOUBTFUL TITLES: HOW BEST RESOLVED

If a point of doubt arises on the title to property which it is desired to sell, what should the vendor be advised to do about it? Take appropriate proceedings to resolve the difficulty before the sale? Ideally, no doubt, the most sensible advice to give, but practically very unpopular with the lay client, who will have to foot the bill of costs. Do nothing about it, and hope that the purchaser will not notice the difficulty? If the objection is not too glaring this is worth trying, for, as "Escrow" pointed out a week or two ago in this journal, slipshod perusal of title is more common now than it should be; but the snag is that if the objection is taken after contract, it is by no means a foregone conclusion that the court will resolve, or indeed even entertain, the point in proceedings for specific performance of the contract or on a vendor and purchaser summons. Or try to remove the difficulty by a special condition, based, perhaps, on a deed of family arrangement? This is the kind of problem which was discussed in *Wilson* v. *Thomas* [1958] 1 W.L.R. 422, and p. 270, *ante*, from which case also some idea can be derived of the respective merits of these various suggestions.

The contract in this case was for the sale of two shares in a trust fund to which the vendors were entitled under a will. The fund was held in trust under the will for numerous persons, many or all of them (it does not matter which) relatives of the testator. One of these persons was described in the will as "Allan Hewitt." Apparently there was no such person as "Allan Hewitt," but there were two persons (presumably relatives of the testator) called Frederick Allan Wilson and Henry Hewitt Wilson. All the other relatives of the testator mentioned in the will were named with two Christian names. Trying to give effect to what seemed, no doubt, to be a compelling interpretation of this gift to a non-existent person, the beneficiaries under the will existing at the time entered into a deed of family arrangement with the trustees, directing the trustees to read the will so that it should take effect as if the words "Frederick Allan Wilson" and "Henry Hewitt Wilson" were substituted for the words "Allan Hewitt" in the relevant part of the will. Two of the then existing beneficiaries, who executed this deed, subsequently contracted to sell their *aliquot* shares in the trust fund to the defendant.

The arguments

The contract contained a special condition providing that the purchaser should assume "as is the case" that the persons who executed the deed of family arrangement were the same persons as the beneficiaries under the testator's will. The defendant objected to the title offered, and when he persisted in his objections the plaintiffs commenced an action for specific performance, pleading the contract and alleging willingness to perform their obligations thereunder. The defendant alleged in his defence that the plaintiffs had not shown a good title, and contended that the special condition to which I have referred was misleading in that on reading it the defendant was entitled to assume that the deed was executed by all persons entitled to the trust fund, but that this was not the case, since

the shares of some of the beneficiaries were settled on protective trusts with remainders over to persons who were not parties to the deed. That was, indeed, the fact, but in reply the plaintiffs relied on, among other things, the special condition.

This contention did not avail the plaintiffs: it foundered on a point of construction. Roxburgh, J., seized on the words "as is the case," which were not true if the condition was intended to mean (as the plaintiffs said it was intended) that all persons beneficially entitled to the fund had executed the deed. Giving, no doubt, the best construction to the condition that in the circumstances it admitted, the learned judge said that "all that that was really intended to mean was that as some of the names in the deed are slightly different from those in the will, the defendant was to assume identity as between the persons named in the will and the persons named in the deed." So interpreted, there was nothing wrong with the deed, which did not then preclude the defendant from objecting that many beneficiaries under the will were not in any way bound by the deed. This the plaintiffs admitted, but they said that if the court were willing to try the question of the construction of the will, admitting such extrinsic evidence as to the identity of "Allan Hewitt" as would be admitted in a will case, it would come to the same conclusion about the point of construction as the parties to the deed had come to. The question, then, was whether evidence ought to be allowed to be called for this purpose. It was a question, strictly, of procedure, but it went, nevertheless, to the root of the plaintiffs' case; if the court refused to construe the will in their action, the plaintiffs' title as pleaded and relied on by them could not be forced on the defendant.

Two points of view

Two cases were referred to by Roxburgh, J., in his judgment as indicating the principle on which this problem had to be solved. Both were Court of Appeal decisions, but unfortunately they point in very nearly opposite directions; perhaps this is to some extent due to the fact that the earlier case was not cited to the court which decided the latter. In *Re Nichols & Van Joel's Contract* [1910] 1 Ch. 43, the vendor's title depended on the construction of a difficult will. When the purchaser objected to it, the vendor took out a vendor and purchaser summons in effect to construe the will. The vendor was offered an adjournment to take out a construction summons, but refused, and the judge held that the title was too doubtful to force on a purchaser. On appeal, this offer was renewed, and this time accepted; on the construction summons, the difficulty was resolved in the vendor's favour; and on the restored hearing of the vendor and purchaser summons, the title was held to be good. All that was left was the question of costs of the latter summons. On this, the Court of Appeal held that the vendor ought to pay these costs, i.e., that the judge below was right in refusing to force the title on the purchaser until the difficulty had been removed in proceedings for the construction of the will. In his judgment, Cozens-Hardy, M.R., said (and these were words much relied upon by Roxburgh, J., in his judgment): "I should be very sorry to have it supposed that it is my view that upon a vendor and purchaser summons it is not the habit and duty of the court in ordinary cases to construe a will or document forming part of the title, but I also think that it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules of the court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the court to force a title on a purchaser which merely may mean that he is buying a lawsuit." Here, then, are references to three elements which will influence the court in refusing to construe a document in proceedings between vendor and purchaser: (1) a difficult point; (2) an easy alternative mode of getting that point determined; (3) the availability of a decision in other proceedings which will bind all persons interested under the document in question, and not merely the vendor and purchaser alone.

The opposite point of view was expressed and adopted in *Smith* v. *Colbourne* [1914] 2 Ch. 533. This was an action for specific performance of a contract for the sale of property as respects which certain rights to light were the subject of a written agreement between the owner and an adjoining owner. It was alleged that this agreement was obscure and rendered the title to the property bad. The Court of Appeal accepted the task of construing the agreement (which it found, did not warrant the purchaser's objection). Lord Cozens-Hardy, M.R., was again a member of the court, and he said this: ". . . it was urged that the title is too doubtful to be forced upon a purchaser. The courts have in modern times not listened with favour to such a defence. It is the duty of the court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision."

But, as Roxburgh, J., pointed out, in *Smith* v. *Colbourne* the point of construction raised in the action and disposed of by the court in that action did not make it necessary to call any extensive evidence. In *Wilson* v. *Thomas* evidence would have been essential. If the construction of the will in the latter case had been raised in a construction summons, any beneficiary wishing to establish that "Allan Hewitt" was two persons would have had to produce evidence to that effect, otherwise he could not possibly hope to establish the fact. Those persons interested to contend the opposite would have produced their evidence, and the court would finally have disposed of the doubt by balancing the evidence. If the point were allowed to be litigated in the plaintiffs' action, however, the burden of seeking for evidence "among a large number of persons, all of whom are strangers to him" would be thrown upon the purchaser. That was not fair. The duty of the plaintiffs was to make a good title, and they could not clear their title (which the deed of family arrangement showed to be doubtful) at the expense of the purchaser. The plaintiffs' action therefore failed.

Lessons of the decision

A number of points emerge from this decision. First (and this is really a side-issue), a special condition to the effect that the purchaser shall assume something "as is the case" lets in an objection if the facts to be assumed do not correspond with the facts as they exist. A title can be made to depend on a hypothesis; but then these words, or similar words, should be avoided. There is another context in which this phrase occurs fairly frequently—the recital. Here, too, if hypothesis and actual fact do not correspond, a recital using this phrase may mislead. Secondly, a point of construction on a document forming part of the title will be determined in proceedings between vendor and purchaser—i.e., in the absence of parties whose rights under the document may depend on the construction, but who would not be bound by the decision in the proceedings—if it is not too difficult, and if it can be determined satisfactorily on such evidence as the vendor may be able to produce: the purchaser will not be put to the

expense of producing necessary evidence. Thirdly, if a vendor runs into difficulties in getting a point of construction determined in proceedings between him and the purchaser, he will usually be given an opportunity of having those proceedings adjourned while the construction point is disposed of in construction proceedings. But will the purchaser always wait while the other proceedings take their course? All in all, it does not seem to be worth running the risk of the heavy costs of a specific performance action, or even the lighter costs of a vendor and purchaser summons, with an unresolved doubt on the title unless it is a very slight doubt, and then only if an adverse decision could not wholly upset the title.

"A B C"

Landlord and Tenant Notebook

BUSINESS PROTECTED BY RENT ACTS

THE decision in *British Land Co., Ltd.* v. *Herbert Silver (Menswear), Ltd.* [1958] 2 W.L.R. 580; *ante*, p. 230 (C.A.), is a reminder not only of the fact that the primary purpose of the Rent Acts is—though the word "restrictions" has been omitted from the title of the most recent enactment—to limit rent, the security of tenure provisions being essentially ancillary, but also of the fact that the inclusion of "combined premises" within the scope of the Acts may mean that more is achieved than the prevention of eviction from one's home. The defendant tenants in the recent case, being a limited company, would not qualify for security of tenure (*Hiller* v. *United Dairies (London), Ltd.* [1934] 1 K.B. 57 (C.A.)), but if combined premises within the rateable-value limit demised to a company are "let as a separate dwelling" (Increase of Rent, etc., Restrictions Act, 1920, s. 12 (2); Rent, etc., Restrictions (Amendment) Act, 1933, s. 16), the application not being excluded "by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes" (Rent, etc. (Restrictions), Act, 1939, s. 3 (3)), then s. 1 of the 1920 Act ("if the increased rent exceeds the amount permitted under this Act . . . the amount of such excess shall notwithstanding any agreement to the contrary be irrecoverable from the tenant") governs the situation (*Carter* v. *S.U. Carburetter Co., Ltd.* [1942] 2 K.B. 288 (C.A.); *Anspach* v. *Charlton Steam Shipping Co., Ltd.* [1955] 2 Q.B. 21 (C.A.)).

The transaction

A two-storeyed building, consisting of a shop, a kitchen, a bathroom and w.c. on the ground floor, and a living-room and three bedrooms on the first floor, was, in July, 1947, occupied by two people: a Miss *D*, lessee of the whole building under a lease due to expire in 1956, rent £90 per annum, who occupied the shop, carrying on an outfitting business; and a sub-tenant who occupied the rest. In that year the plaintiffs bought the freehold, subject to and with the benefit of Miss *D's* lease; either in or before 1952 the sub-tenant left, and early in 1953 Miss *D* sub-let the residential part to a Miss *M*. In 1955 Miss *D*, having conditionally agreed to sell the goodwill, etc., of her business to the defendants, surrendered her lease to the plaintiffs and accepted from them a new lease, fifteen and one-half years from December, 1954, at an annual rent of £325; which lease she then assigned to the defendants. In September of the following year the defendants put forward the contention that £325 less £90 was excess rent.

The tests

The crucial question was: was the building a house let as a separate dwelling? The Acts themselves do not suggest any criterion, but the approach worked out in *Wolfe* v. *Hogan* [1949] 2 K.B. 194 (C.A.), and more recently approved in *Levermore* v. *Jobey* [1956] 1 W.L.R. 697 (C.A.), has long been recognised as the correct way of answering the question. One first considers the terms of the letting; if these supply the answer, say in the shape of a covenant as to user, one looks no further. In the absence of such guidance, one examines "contemplation" in the light of circumstances, the physical nature of the premises being an important circumstance. If one is still left in doubt, actual use comes into the picture.

Upholding the decision of the county court, the Court of Appeal held that this was a case in which the first test sufficed.

The lease

As far as the details of the lease are given in the report, one might be inclined to say that they did not point very strongly to a contemplation of residential user. The parcels specified "all that messuage or shop and premises situate and being, etc." (and, indeed, an attempt was first made, in the county court, to show that the residential portion was not included in the demise; but was abandoned).

There were a number of repairing covenants. More often than not, tenancies of controlled properties omit to deal with repairs; at all events, their presence in this case could hardly have been considered conclusive of the proposition that the lease evidenced the letting of a separate dwelling-house.

But there were some covenants restrictive of user—and the fact that they did not prohibit the lessee from using the demised premises, or prohibit the use of the residential portion, as living accommodation, told heavily in the defendants' favour. Still, from the way in which it was put, one might think that the second test played its part; a statement that covenants do not prohibit the user of a residential portion as living accommodation recognises the fact there is a portion of the building physically suitable for use as a dwelling. As to the third test, the judgment of the Court of Appeal refers to the fact that Miss *M* was in occupation as conclusive evidence of intention that the premises were let as a dwelling-house, rather implying that the same finding would have been justified if the residential portion had happened to be unoccupied.

Intention

For ultimately, what has to be decided, when the issue is whether premises are *let as* a dwelling-house, is whether whatever the parties agreed to do would bring the letting within the scope of the legislation. It was forcefully argued that when the plaintiffs and Miss *D* and the defendants agreed that if Miss *D* would surrender her £90-a-year lease they would grant her a new one at £325, to be assigned to the defendants, nobody was thinking about the advantages of the building as a dwelling-house; the defendants were interested in the premises as business premises and business

premises only. But, like the Rent, etc. (Restrictions) Act, 1939, s. 3 (3), the Court of Appeal would not have that "only." There was a residential portion and it yielded £52 a year; and in fact the plaintiffs conceded in argument that if that portion had been vacant and the defendants could have installed a manager there, or could have sub-let the residential part with the plaintiffs' consent, the premises would have been "let as a separate dwelling-house."

For the point most strongly relied upon depended on the fact that there was a sitting tenant in rent-controlled premises at the time of the lease. If an estate agent had had the property on his books, it was argued, he would have looked for a purchaser interested in business premises; he would have added that there was £1 a week coming in, but the rent would have been negotiated solely in relation to the business part. But this argument could not prevail against the contention that what mattered was: for what purpose as to user were the premises let? The parties did contemplate continued user of that residential part as a residential part; both the lease, by not restricting such user, and the facts showed that here was a "house let as a separate dwelling."

Dominant purpose

In the judgment of the Court of Appeal delivered by Hodson, L.J., the defendants' claim was said to be one "utterly without any merit," and it may well be that not only the plaintiffs but competitors of the defendants feel some sense of grievance at a result which (allowing for the possibility of Miss *M* obtaining a reduction of rent by apportionment) brings the defendants' outgoings as regards rent down to a very low figure. But the case merely affords a somewhat striking illustration of a phenomenon which is far from new; once you have "combined premises," it does not matter how substantial is the business user as compared with the residential user: this proposition was established by *Vickery* v. *Martin* [1944] K.B. 679 (C.A.).

R. B.

"THE SOLICITORS' JOURNAL," 8th MAY, 1858

On the 8th May, 1858, The Solicitors' Journal wrote: "A very unsatisfactory discussion on the subject of alleged delays in the Court of Chancery took place in the House of Lords on Monday evening. On the one side the most exaggerated representations were given as to the actual state of the business in chambers and the mode of conducting it; and, by a natural reaction, this was met, on the part of the present and some former Chancellors, by a disposition to deny the necessity for any improvement at all. Reformers like Lord Lifford, who pitch their complaints in too high a key, do more to prevent reasonable amendments than the most Eldonite admirers of the *status quo*. An advocate of reform, who desired to defeat his own purpose, could not do better than select as a prominent grievance a case which even if his information were accurate, had nothing whatever to do with the defects in the machinery which he wished to improve. This was exactly the course Lord Lifford took. He made a great point of the assumed neglect of the Court of Chancery, in the management of the Irish estates of a certain infant . . . Unfortunately the case of the Irish minor gave an opportunity to those who were opposed to any reform to fly off from the real grievance and content themselves with disproving the imaginary one . . . Something like a triumph was given to the obstructive side through the indiscretion of Lord Lifford's reforming zeal. So far as the state of business in chambers was referred to, the tone, both of the present and late Chancellor, offers little encouragement to those who are anxious to see the improvements in the Court of Chancery carried to the highest possible level of efficiency."

HERE AND THERE

GALLIC COMPLIMENT

The French do not always share our own conviction that British justice is the best in the world. It is with pleasure, therefore, that I record a fervent Gallic compliment recently paid to it by a friend of mine. What little faith he had in our judicial system had been destroyed some time ago by the hanging of Ruth Ellis (who, you remember, had dispatched a former lover in a spatter of revolver shots). Like all good Frenchmen he felt indignantly that it was a terrible waste to hang a pretty woman, especially a pretty woman of obvious spirit. Strangely enough, his faith in British justice was, he has told me, restored by a prolonged session in the Divorce Court, where our legal goings on are usually even more incomprehensible to the logical French than those at the Old Bailey. He and his wife had narrowly escaped having to give evidence in a case involving some friends of theirs, but they could not resist going to see what happened. In their opinion most of the witnesses lied with the most splendid abandon, but they were in speechless admiration of the way in which Mr. Justice Wrangham pierced through to the truth of the domestic situation. In my friend's own picturesque phrase, "he might have been living under their sofa for years," he understood them so well. A charming anecdote from the evidence deserves to be rescued from oblivion. One of the witnesses having been caught out in a series of palpable falsehoods, the judge said to her severely: "But, madam, do you not see that those are lies, flat lies?" "Well, yes, my lord," she said, "perhaps they're lies, but they're not *flat* lies." The subtle difference between a lie and a flat lie may well perplex experts in English usage. No doubt a flat lie is a lie that one has slept on. Or perhaps the distinction may be illustrated by the reaction of a former strong-minded Irish judge to a particularly persistent liar: "See here, sir. Such lies as your attorney advises you are necessary to support your fraudulent case I shall listen to, although I shall decree against you. But if you tell me one more *unnecessary* lie I shall commit you for contempt of court."

THE LONG AND THE SHORT

In one respect, at any rate, the French must admit that English criminal justice has something which their own has not—dispatch. It may be that the English have not an intellectual passion for getting at the inner truth of a human situation, but in their practical, pragmatical way they do get somewhere. They define the issues of fact; they limit the admissible evidence. They keep the whole proceedings neatly within touchline or boundary, like a football or cricket match, and within those boundaries and according to the rules of the game, they reach a conclusion. But the French, more concerned with trying a person than

a set of defined allegations, draw the boundaries far less closely, with the result that criminal cases may drag on for years, often with no final conclusion. The Dominici case was one example. That of Marie Besnard is even more curious and striking. We are reminded of it because, after almost ten years of protracted proceedings, it is just reaching a new and apparently far from final stage of judicial investigation. In 1949 Madame Besnard was indicted on charges of multiple murder on allegations that she had systematically poisoned a whole succession of her relatives with arsenic. She was tried at Poitiers in 1952 and at Bordeaux in 1954. Both trials were adjourned for further chemical analysis of the exhumed remains. After the second adjournment the matter was put into the hands of the most distinguished analysts available in the French scientific world. Pending their investigations, the accused, who had been in custody for 55 months, was provisionally released. Four more years have gone by. Some of the analysts have died; others of those suggested have declined to touch the case. The two experts currently handling the affair have persuaded the Public Prosecutor to order the exhumation of four bodies quite unconnected with the case from the same country cemeteries where the supposed victims were buried. The theory they want to test is that chemical weed killers used in the adjoining fields may have so saturated the earth in their vicinity that the presence of arsenic in a body is of no significance at all. This had been suggested by defending counsel at the original trial, but the defence now object that to adopt it at this stage might postpone the resumption of the hearing for another two years; let the court get to work on the material available. Meanwhile, at least, Madame Besnard is provisionally at liberty. To that extent she is better off than Caryl Chessman who has been living in a death cell in St. Quentin Prison in California since 1948, winning successive reprieves, studying law literally for dear life, achieving success in authorship. After so long one gets rather out of touch with the latest developments but I believe he is still there watching the legal machinery still in motion.

RICHARD ROE.

TALKING "SHOP"

THURSDAY, 1ST *May*, 1958.

WHEN it comes to a choice between the methods of Lord Eskgrove and Sir W. Grant, one time Master of the Rolls, I must own to a preference for the latter. Lord Eskgrove, when condemning a tailor to death for the murder of a soldier, loquaciously observed: "And not only did you murder him, whereby he was bereaved of his life, but you did thrust, or push, or pierce, or propel the lethal weapon through the belly-band of his regimental breeches, which were His Majesty's." But by contrast Sir W. Grant contentedly listened to counsel for two days on the meaning of an Act of Parliament and when counsel had quite finished said: "Gentlemen, the Act on which the pleading has been founded has been repealed." The same judge, it is said, took two rides at Banff. On the first, the only words that escaped him were on passing a field of peas: "Very fine peas"; on the second, at the same spot: "And very finely podded, too!" It is reported that he was not only the most silent but the most patient of judges. It would be pleasant if one could truthfully record that since his time loquacity and impatience have been banished from the Bench.

FRIDAY, 2ND

I see that one of my correspondents has altered his reference from A.I.D. to A.T.D., as well he might. It is a distressing thought that one may open the newspaper any day of the week and find that one's initials stand for something that the most discreet parents could not have foreseen at the font. We have all heard of the couple named Rose who christened their daughter "Wild": such a charming conjunction until she married a man named Bull; but we must allow that they brought it on themselves and her. To have something like "artificial insemination donor" overtake one's identity in middle life is one more risk to which the rigours of civilisation now expose us.

MONDAY, 5TH

State visit to the office of the fourth partner's eleven-plus third daughter. We invited her to say a few words into the new dictaphone on the third floor and were given a verse about the elephant walking along. Like others of more experience in dictation she forgot that the infernal machine may be halted by releasing the lever in the hand microphone and so tripped over the fourth line. The Head of the Department then played the verse back and presented her with the record. The fourth partner suspects that the Head was making sure that it does not appear amongst the fourth partner's letters for signature tomorrow. The record has now been placed with the sea-shells, glass animals, collections of bark, unfinished embroidery and other personal chattels of the owner; I understand it is to be cut into rose-tinted spectacles for Mr. Macboozle, the head puppet, in honour of the occasion.

Talking of dictaphones I am told that the principal difficulties are (*a*) afterthoughts (as, for example "take three carbons of this" at the end of five rolls); and (*b*) inhuman indifference of the machine to the new summer frock.

The Head of the Department's precautions were doubtless inspired by a close acquaintance with the rule in *Rylands* v. *Fletcher* as once more demonstrated in the recent case of the circus elephant, and they put me in mind of a sad occasion some twenty-five years ago when one of our senior managers handed out a manuscript draft to his typist for endorsement on the principal mortgage. Those were the days of waste not, want not (to be distinguished from the present, when sheets of notepaper with such legends as "Dears" or "Modom" may be found in the wastepaper baskets)—and so the MS. was frugally hand-written on the back of a sheet of typed paper rescued from ancient litigation. Later in the day your diarist was summoned to the presence of the senior manager to examine the "statutory receipt," which started "Dear Sir" and continued at some length in the most disparaging terms about the defendant's beans.

TUESDAY, 6TH

It is said that the strength of the British Constitution lies in its unwritten form—a precedent which could have pointed a moral to the framers of the Cheques Act, 1957. But regardless of this, they chose to gild the lily of the new unindorsed cheque with an anaemic version of *Egg* v. *Barnett*

(1800), 3 Esp. 196. You will not find *Egg* v. *Barnett* in the Revised Reports. Perhaps the learned editors disapproved the decision or did not think highly of the reporter; but, by my guess, they just rated it as a glimpse of the obvious. It is laconically noted in the English and Empire Digest, vol. 12, at p. 561, as authority for the following proposition:—

> To prove payment of a debt due by deft. to pltf., a banker's cheque drawn by deft. on his bankers and which appeared to have been received by pltf., is evidence to go to the jury of the payment.

" Evidence to go to the jury ": not, it will be observed, conclusive evidence, but evidence of unmeasured value which a jury may take into account in deciding whether a debt had been discharged or not. It does not seem an earth-shaking decision now, nor probably did it seem so to a generation of lawyers but a few years distant from the tumbrils and guillotines of the French Revolution. However, one may infer that it was from *Egg* that s. 3 of the Cheques Act was hatched; and the yolk of *Egg*, so to speak, is in the words " which appeared to have been received by the plaintiff." Obviously the plaintiff's indorsement of the defendant's cheque would be *prima facie* evidence of his having received it. And doubtless the framers of the Act thought that debtors should not be prejudiced by the want of an indorsement.

This, or something like it, must account for the now notorious s. 3, whereby an unindorsed cheque which appears to have been paid by the banker on whom it is drawn is to be " evidence " (again of undetermined quality; good, bad or indifferent) of the receipt by the payee of the sum payable by the cheque. It has been remarked in *Law Notes*, the *Law Society's Gazette* and elsewhere that the section equates an unindorsed paid cheque with an indorsed paid cheque, and doubtless this is the substantial effect of it. But *Egg* did at least profess to deal with the question of admissible evidence of discharge of a debt. Section 3 does not profess to deal with such a question at all. It is, on the face of it, concerned only with the receipt of a sum of unexplained purpose, which may be in discharge of a debt or may not.

Be this at it may, was there ever such a monstrous parturition as that of s. 3? Upon the two suppositions—both illusory—that there has been a fundamental change in the law, and that an unindorsed paid cheque is now an adequate substitute for a creditor's acquittance, the section has been widely acclaimed as a charter of dispensation from the irksome routine of supplying receipts and a providential relief from 2d. revenue stamps. To lawyers both the publicity given to the section and the velocity of the change in sound commercial practice must alike remain incomprehensible. Whatever the section does or does not do, it certainly does not provide evidence which will link your cheque with identifiable goods or services or a specific account.

It all goes to show what happens when long-established principles are exhumed from the decent obscurity of the common law and exposed to mercantile gaze. Fortunately there is still s. 103, Stamp Act, 1891, and those who demand receipts for £2 or upwards should have no difficulty in obtaining them.

TAILPIECE

Full marks to the member of my staff, who, being instructed to advise a client to " put on the idiot boy act," recommends him to " feign a calculated degree of naïvety." We hope to find a place for it in our handbook of indispensable euphemisms.

" ESCROW "

RENT ACT PROBLEMS

Readers are cordially invited to submit their problems, whether on the Rent Act, 1957, or on other subjects, to the " Points in Practice " Department, " The Solicitors' Journal," Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, but the following points should be noted:

1. Questions can only be accepted from registered subscribers who are practising solicitors.
2. Questions should be brief, typewritten *in duplicate*, and should be accompanied by the sender's name and address *on a separate sheet*.
3. If a postal reply is desired, a stamped addressed envelope should be enclosed.

Schedule I—LANDLORD'S UNDERTAKING TO REPAIR—FAILURE TO REPAIR—RENT LIMIT

Q. *A* is the tenant of a maisonette in a certain property; we act for the landlord. The property remains controlled under the 1957 Act. On 10th August, 1957, we received a list of defects served by the tenant *A* on behalf of the landlord. On 20th November, 1957, a notice was received by us from the local authority of a proposal to issue a certificate of disrepair. On 11th December, 1957, we on behalf of the landlord gave an undertaking to the local authority to remedy the defects proposed to be included in the certificate of disrepair. On 11th December, 1957, a notice of increase of rent under the 1957 Act was served by us on behalf of the landlord increasing the rent to two and one-third times the gross annual value by the usual two stages. (Both in the tenant's notice of defects and in the local authority's notice to the landlord the landlord was made responsible for internal decorations. This position the landlord accepted in his undertaking to remedy defects.) The rent paid by the tenant prior to the Act coming into force was 15s. 1d. per week to include rates and water charges paid by the landlord and amounting to £26 5s. per annum. The gross annual value is £33 and the ultimate rent limit asked from the tenant was therefore £77 plus the rates borne by the landlord of £26 5s., making a total of £103 5s. per annum. The landlord has now obtained an estimate for the necessary repairs which he finds excessive and the expenditure not justifiable. If the landlord fails to carry out the repairs necessary in accordance with his undertaking given to the local authority, what is the rent which he can recover from the tenant *A*: (1) From 11th March, 1958 (when the notice of increase of rent by the first 7s. 6d. per week took effect), until 11th June, 1958, when his undertaking to the local authority expires? (2) After 11th June, 1958, when the landlord has failed to carry out the repairs covered by his undertaking? We are at a loss to decide whether the rent during either of these periods should be the original rent prior to the Rent Act coming into operation of 15s. 1d. per week or one and one-third times the gross annual value, i.e., £44 per annum plus the rates payable by the landlord of £26 5s. per annum. The difference is of course approximately 12s. per week.

A. The relevant provisions are those contained in para. 7 of Sched. I to the Rent Act, 1957. By this paragraph a

notice of increase has no effect if served after an application has been made for a certificate of disrepair while the certificate is in force. By para. 7 (2), however, where a certificate of disrepair is issued then as respects a rental period beginning while the certificate is in force the appropriate factor shall be four-thirds and the rent limit so ascertained. The answer, therefore, would appear to be that if the rent has been increased to the rent limit it will on a certificate of disrepair being issued be reduced to four-thirds the gross value plus rates, but if a notice of increase fails to take effect because of the issue of a certificate of disrepair the rent payable will be that recoverable before the commencement of the Act, or four-thirds the gross value plus rates, whichever is the less. On the facts of the problem the notice of increase took effect on 11th March, 1958, because at that date no certificate of disrepair was in force. Accordingly, when the certificate is issued the rent will be reduced by para. 7 (2) to four-thirds the gross value plus rates. We consider, therefore, that until the certificate is issued the rent will be as provided for in the notice of increase, and after the certificate has been issued it will be four-thirds the gross value plus rates. This is, of course, subject to the tenant's right under para. 7 (4) to deduct from rent paid after the certificate has been issued such amounts as will mean that he has not paid rent after the application for the certificate greater than he has to pay after the issue of the certificate.

Schedule I—Notice of Defects of Repair Bad—Proposal to Issue Certificate of Disrepair

Q. Will you please indicate how a landlord can prevent the issue of a certificate of disrepair by a local authority if the tenant's notice is bad either in form or by way of service and (*a*) the local authority acting in good faith issues a Form J, or (*b*) the local authority issues a Form J being aware that the tenant's notice is bad.

A. The Act does not, in our opinion, provide the landlord with any specific remedy; and the position is the same whether the authority act in good faith or after notice that the alleged Form G notice was bad in form or was not properly served. The position is, we consider, governed by para. 3 and para. 4 (1) of Sched. I; the former providing "The provisions of this Part [Pt. II] of this Schedule shall have effect where the tenant . . . *serves* on the landlord a notice in *the prescribed form* . . ." and the latter: "If, on the expiration of six weeks from the *service* of *a notice* under the last foregoing paragraph . . ." The landlord could, in our opinion, apply for an order of certiorari to quash the certificate of disrepair, in deciding whether to issue which the local authority were bound to act judicially: see *R.* v. *Electricity Commissioners; ex parte London Electricity Joint Committee Co.* (1920), *Ltd.* [1924] 1 K.B. 171; *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180; *R.* v. *Manchester Legal Aid Committee; ex parte R. A. Brand & Co., Ltd.* [1952] 2 Q.B. 413; or, simply for a declaration that the authority had acted *ultra vires:* see *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18. As the certificate itself makes merely a fleeting reference to the application we do not consider that its validity could be impugned by ignoring it; nor is the position covered by Sched. IV, para. 4 (5), providing for cancellation, but limited to cases in which defects ought not to have been specified.

BOOKS RECEIVED

Middle East Law Review. Volume 1. Number 1. pp. 53. 1958. Published in Beirut, Lebanon.

Trade Union Law and Practice. By Horatio Vester, of Gray's Inn and the Oxford Circuit, Barrister-at-Law, and Anthony H. Gardner, O.B.E., T.D., Solicitor. pp. xxx and (with Index) 300. 1958. London: Sweet & Maxwell, Ltd. £1 15s. net.

Spicer & Pegler's Practical Book-keeping and Commercial Knowledge. Tenth Edition. By W. W. Bigg, F.C.A., H. A. R. J. Wilson, F.C.A., and A. E. Langton, LL.B. (Lond.), F.C.A. pp. xv and (with Index) 471. 1958. London: H.F.L. (Publishers), Ltd. £1 1s. net.

The County Court Practice, 1958. Edited by His Honour Judge Sir Edgar Dale, R. C. L. Gregory, LL.B., of Gray's Inn, Barrister-at-Law, and of the Lord Chancellor's Department, and Mr. Registrar Douglas Fearn. pp. ccxliii and (with Index) 2124. 1958. London: Butterworth & Co. (Publishers), Ltd.; Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. £4 7s. 6d. net.

The Law and Practice of Meetings. Fourth Edition. By Frank Shackleton. pp. xxiv and (with Index) 206. 1958. London: Sweet & Maxwell, Ltd. £1 10s. net.

Emmet on Title. Fourteenth Edition. First Supplement to 28th February, 1958. By J. Gilchrist Smith, LL.D. pp. xviii and 104. 1958. London: The Solicitors' Law Stationery Society, Ltd. 15s. net.

The Elements of Drafting. Second Edition. By E. L. Piesse, Solicitor, and J. Gilchrist Smith, LL.D., Solicitor. pp. xv and (with Index) 119. 1958. London: Stevens & Sons, Ltd. 12s. 6d. net.

Affiliation Proceedings. By A. J. Chislett, B.Sc., Clerk to the Justices, County Borough of Croydon. pp. xx and (with Index) 190. 1958. London: Butterworth & Co. (Publishers), Ltd. £1 10s. net.

The Modern Law of Real Property. Eighth Edition. By O. C. Cheshire, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law. With an Appendix on the Rent Acts by J. B. Butterworth, M.A., of Lincoln's Inn, Barrister-at-Law. pp. lxi and (with Index) 965. 1958. London: Butterworth & Co. (Publishers), Ltd. £2 15s. net.

Current Law Citator 1947–1957; Current Law Year Book, 1957. General Editor: John Burke, Barrister-at-Law; Year Book Editor: Clifford Walsh, LL.M., Solicitor. 1958. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. £4 10s. net. (Two Volumes.)

"Current Law" Income Tax Acts Service [CLITAS], Release 44: 29th March, 1958. London: Sweet & Maxwell, Ltd. Stevens & Sons, Ltd. Edinburgh: W. Green & Son.

"Current Law" Income Tax Acts Service [CLITAS], Release 45: 17th April, 1958. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. Edinburgh: W. Green & Son.

Mr. William Walker, managing clerk to Messrs. Outhwaite and Sutcliffe, solicitors, of Middlesbrough, has recently celebrated his completion of fifty years' legal work. A dinner was given in his honour and he was presented with a silver coffee service by the firm.

Practitioners may, on request, obtain copies of "Overseas Trade Corporations: Explanatory Notes," issued by the Board of Inland Revenue, from their tax offices. These notes explain the main features of the law and practice relating to Overseas Trade Corporations.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

House of Lords

INCOME TAX: PROFITS TAX: VALUE PAYMENTS TO PROPERTY-DEALING COMPANY: WHETHER CHARGEABLE

London Investment & Mortgage Co., Ltd. *v.* Worthington (Inspector of Taxes)

Same *v.* Inland Revenue Commissioners

Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow

24th April, 1958

Appeal from the Court of Appeal ([1957] 1 W.L.R. 116; 101 Sol. J. 61).

A company which carried on the trade of property dealing received value payments under the provisions of the War Damage Act, 1943, in respect of some of its properties which had been damaged and destroyed by enemy action. The Special Commissioners held that, in computing the balance of profits for taxation purposes, the company should in general include value payments as receipts of its trade, but that where a property had been, was being, or was intended to be, repaired or rebuilt, sums received in respect of such payments should not be included as receipts, but should be deducted from the amount expended on rebuilding. The company appealed against the general conclusions of the commissioners; the Crown cross-appealed against the conclusions regarding the properties intended to be rebuilt. Upjohn, J., allowed the company's appeal from the decision of the Special Commissioners and dismissed the Crown's cross-appeals. He held that the value payments were not a trading receipt, as they constituted a receipt by the taxpayer, not as a part of his trading operations, but because he was compelled under the war-damage scheme to make payments with the corresponding right of receiving the benefit in his capacity, not as a trader, but as an owner of land. The Crown appealed successfully to the Court of Appeal. The company appealed to the House of Lords.

Viscount Simonds said that the value payments as a whole were to be treated as trading receipts or as a whole they were not. The Court of Appeal held that they were and his lordship agreed. No doubt the payments were *prima facie* trading receipts, but the strength of the company's case lay in the special provisions of the War Damage Acts and, in particular, s. 66 of the Act of 1943 and s. 28 of the Act of 1949. By s. 66 contributions made and indemnities given under that part of the Act should be treated for all purposes as outgoings of a capital nature. But s. 80 authorised the Treasury from time to time to make estimates of the net receipts of the Exchequer under that part of the Act on the one hand, and expected payments on the other hand, and to increase or reduce the contributions accordingly. It would therefore appear reasonable that the total net contribution to the Exchequer should not be in effect reduced by allowing the contributor to bring it into account as an income payment for income tax purposes. Replacing s. 113 of the Act of 1943 and made retrospective so that it was applicable to this case, s. 28 of the Act of 1949 related to income tax, profits tax and excess profits tax. It provided that in computing the amount of the profits or gains or of the income from any source of any person for any purpose of those taxes no sum should be deducted in respect of any payment or expenditure therein mentioned. By subs. (2) no sum was to be included in respect of any payment or expenditure to which the section applied in computing (*inter alia*) the cost to the person of maintenance, repairs, insurance and management in respect of which relief might be claimed under or by reference to r. 8 of No. V of Sched. A. By subs. (4) the expenditure to which the subsection applied was any expenditure on repairing or otherwise making good war damage to land in so far as any person had received or was entitled to a payment in respect of the damage by virtue of the Act of 1943. It was argued that it was a matter of necessary implication that, if expenditure on repairing or otherwise making good war damage was not allowable as a deduction so far as it might be covered by a war-damage payment, such payments must in no circumstances be treated as trading receipts for tax purposes. That argument could not be accepted. Doubtless it operated harshly against the taxpayer if, having brought into account a payment as a trading receipt, he was disallowed an equivalent amount of expenditure on repair. But equally it was for him an uncovenanted benefit if he did not bring into account a sum which, had it been the proceeds of sale of his property, instead of compensation for its loss, he must have brought into account. The case was concerned with a value payment, not a cost-of-works payment. His lordship did not intend to say anything which would prejudice the case of the latter, but, so far as value payments were concerned, there was no provision, express or implied, which enabled a property owner to exclude them from his computation of profits. During the argument there was some discussion of r. 3 (*k*) of the General Rules of Sched. D to the Income Tax Act, but his lordship was content to abide by the plain meaning of the statute. The appeal should be dismissed with costs.

The other noble and learned lords agreed in dismissing the appeal. Appeal dismissed.

Appearances: *Senter*, Q.C., and *Desmond Miller* (*R. C. Bartlett & Co.*); *Cross*, Q.C., and *Alan Orr* (*Solicitor of Inland Revenue*).

[Reported by F. Cowper, Esq., Barrister-at-Law] **[2 W.L.R. 842**

Court of Appeal

INCOME TAX: ACTUAL INCOME: COLLIERY UNDERTAKING NATIONALISED: COMPENSATION: INTERIM INCOME PAYMENTS

Inland Revenue Commissioners *v.* Whitworth Park Coal Co., Ltd. (In Liquidation)

Same *v.* Ramshaw Coal Co., Ltd. (In Liquidation)

Same *v.* Brancepeth Coal Co., Ltd. (In Liquidation)

Jenkins, Romer and Ormerod, L.JJ.

21st February, 12th March, 1958

Appeals from Harman, J.

The W. P. Coal Co., Ltd., carried on the trade of a colliery proprietor until 1st January, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946. At all material times the company was one to which s. 21 of the Finance Act, 1922, applied, and was an "investment company" within the meaning of s. 20 (1) of the Finance Act, 1936. The company received from time to time payments from the Ministry of Fuel and Power for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946, and (in the case of others of such payments) of that Act and the Coal Industry (No. 2) Act, 1949. The company appealed against directions made upon it under the provisions of s. 21 of the Finance Act, 1922, as amended by s. 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51, and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions. The Special Commissioners held that the payments in question were chargeable to income tax under the provisions of Case VI of Sched. D to the Income Tax Act, 1918, and were not chargeable under Case III of the said schedule nor under Sched. C. They further held that the payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income (as agreed between the parties in accordance with their decision) of £5,422 14s. for 1948–49, £3,453 15s. for 1949–50 and £2,949 3s. for 1950–51. Harman, J., reversed the decision of the Special Commissioners and from such reversal the company appealed. *Cur. adv. vult.*

21st February.

Jenkins, L.J., delivering the judgment of the court, said that those payments made in respect of interim income which were

revenue payments made pursuant to s. 22 (3) of the Act of 1946 and s. 1 (2) of the Act of 1949 could properly be classed as annual payments within the meaning of r. 1 (*a*) of Case III of Sched. D, and were subject, accordingly, to r. 21 of the General Rules. This, however, was subject to the question whether a payment made by a Minister of the Crown could fall within r. 1 (*a*) of Case III of Sched. D and r. 21 of the General Rules. In their lordships' judgment Case III of Sched. D was inapplicable since the payer of the annual sums in question was a Minister of the Crown, and the provisions relating to Case III of Sched. D in its application to annual payments were such as to preclude the construing of the word "person" in r. 21 of the General Rules, which was co-extensive with r. 1 (*a*) of Case III, as including the Crown. This conclusion they thought accorded in its result with the views expressed by the House of Lords in *Madras Electric Supply Corporation, Ltd.* v. *Boarland* [1955] A.C. 667. It followed in the view which they took that the whole of the interim income payments (including revenue payments) fell within Case VI of Sched. D, and it only remained to consider whether such payments were nevertheless, as contended by the Crown, taxable as income of the years in which they were received, or, on the other hand, as contended for the company, to be treated as accruing from day to day over the period in respect of which they were paid. In their lordships' judgment, since in their view the word "arising" in r. 2 of the rules applicable to Case VI must be construed as meaning "received," the payments in question must be treated as income of the years in which they were received. The other two cases concerned sub-apportionments to the two companies concerned under the provisions of s. 21 of the Finance Act, 1922, of their appropriate proportions of the total income of the first appellant company, and accordingly involved precisely the same question, which must be answered with respect to the second and third companies in the same way. At the conclusion of the judgment, on the question of costs, counsel for the company contended that as the court had held that the payments fell within Case VI and not Case III and tax had therefore been improperly deducted by the Crown in making the payments, the company should be assessed on the amounts actually received as contended by the Crown, that was, the net amounts and not the grossed up amounts, and the apportionments made by the Special Commissioners were therefore excessive. The court adjourned the case for further argument.

12th March.

After further argument the court held that, on the case stated, and in the circumstances of the case, this point was not open to the company and it dismissed the appeal. Appeal dismissed. Leave to appeal to the House of Lords.

APPEARANCES: *F. N. Bucher*, Q.C., and *Peter Rowland* (*Tamplin, Joseph & Flux*); *John Pennycuick*, Q.C., *E. Blanshard Stamp* and *Alan Orr* (*Solicitor of Inland Revenue*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[2 W.L.R. 815**

COSTS: SUCCESSFUL PLAINTIFF DEPRIVED OF COSTS: LEAVE TO APPEAL REFUSED: SCOPE OF JURISDICTION ON APPEAL

Baylis Baxter, Ltd. *v.* Sabath

Jenkins, Parker and Pearce, L.JJ. 16th April, 1958

Appeal from McNair, J.

The Judicature Act, 1925, provides by s. 31 (1): "No appeal shall lie— . . . (*h*) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof . . as to costs only which by law are left to the discretion of the court." The plaintiff company brought an action against the defendant, a former employee, to recover £1,253, said to be a debt due on a running account. The defendant alleged that repayment of the debt was to be contingent on the receipt by him of a sum claimed in respect of certain expropriated assets abroad, and counter-claimed a sum of £1,083 said to be due to him as arrears of a salary of £500 a year. At the trial the principal witness for the plaintiff company was one *P* who controlled the company though he was not a director. McNair, J., rejected much of the evidence given by *P* but gave judgment for the plaintiff company on the claim and counter-claim on the ground that the defendant had not made out his case on either issue. McNair, J., stated that he attached little weight or credibility to the evidence of either *P* or the defendant; he refused to make any order as to costs in view of the impression he had formed of *P's* evidence, and refused leave to appeal on that issue. The plaintiff company appealed.

JENKINS, L.J., said that there were certain statutory difficulties in the way of the appeal. Section 50 (1) of the Act of 1925 and Ord. 65, r. 1, made the award of costs subject to the discretion of the judge, and s. 31 (1) made such an award unappealable without leave. The plaintiffs contended that, on the authorities, an appeal would lie without leave if the judge had taken into account wholly irrelevant matters, or exercised his discretion without proper material. In particular, it was said that both *P* and the defendant had given false evidence; they cancelled each other out and so costs ought to follow the event. That was an unimpressive argument: once it was conceded that the credibility and conduct of the parties were relevant to the exercise of discretion, it followed that the trial judge was in the best position to decide the question. The plaintiffs had relied on *Hudsons, Ltd.* v. *De Halpert* (1913), 108 L.T. 416, and *Hong* v. *A. & R. Brown, Ltd.* [1948] 1 K.B. 515; but if the first case meant that a company could not be penalised in costs for misstatements by its representative in evidence, it was wrong; and in the second case the observations of Lord Greene, M.R., could not be taken to go beyond the observations of Lord Cave in *Donald Campbell & Co., Ltd.* v. *Pollak* [1927] A.C. 732, at p. 811, which showed that where the judge had limited the matters taken into account to those concerned with the litigation, the statute prohibited the entertainment of an appeal. That case had cut down a certain latitude which the Court of Appeal had previously permitted themselves. The court could not entertain such an appeal without leave unless it could be said that the judge did not in truth exercise his discretion at all. That meant that the case must be one of the type to which Lord Cave had referred, where the judge's discretion had been based on some misconduct wholly unconnected with the cause of action or on some wholly irrelevant consideration. In the present case the judge had exercised his discretion on matters which were wholly relevant to the action, and having regard to the statutory provisions the appeal could not be entertained.

PARKER and PEARCE, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *D. L. McDonnell* (*P. Cromwell*); *A. R. Barrowclough* (*Herbert Oppenheimer, Nathan & Vandyk*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 529**

Chancery Division

COMPANY: INCORRECT SPELLING OF COMPANY'S NAME IN WINDING-UP PETITION

In re J. & P. Sussman, Ltd.

Vaisey, J. 10th March, 1958

Petition to wind up.

In a creditor's action intended to be against J. & P. Sussmann Ltd. the company's name was incorrectly spelt "J. & P. Sussman Ltd.," in the writ as it was also in the appearance entered by the company, and in a subsequent winding-up petition, the advertisement and the winding-up order. When, on the usual procedure to record the order on the register the mistake was discovered and the order could not be recorded against J. & P. Sussmann Ltd. because of the mistake, the winding-up petition was again brought before the court on an application to amend it by correctly spelling the company's name: and another creditor who by then also had recovered judgment and was closely associated with the company asked leave to appear out of time and oppose the application.

VAISEY, J., said that the origin of the mistake was the conduct of the company which chose to adopt as its name, and entered an appearance in, the misspelt name. The decision of Astbury, J., in *In re L'Industrie Verrière, Ltd.* [1914] W.N. 222, in which he held that where the mistake consisted of a trifling error in spelling, by which no one could possibly be misled, and there was no other company of any similar name on the register the court ought to exercise its discretion and waive the formal defect, was authority for making the amendment which would put the matter right. The amendments in the petition which were required were not only to get the name "Sussmann"

correctly spelt wherever it appeared, but also to word the reference to the judgment as follows: " The company is indebted to your petitioner in [the relevant amount] the amount of a final judgment obtained by your petitioner against the company in an action in the High Court of Justice described as ' J. & P. Sussman Ltd.' " It would then state the judgment correctly, but it would indicate that it was obtained in the wrong name. The original order for the winding up would be made as of the date of the present judgment. The leave applied for to appear would be refused. Order accordingly.

APPEARANCES: *I. Edwards-Jones* (*Pritchard, Englefield & Co.*, for *Latin & Masheder*, Liverpool); *Leonard Lewis* (*B. A. Woolf and Co.*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[1 W.L.R. 519**

COMPANY: ARTICLES OF ASSOCIATION: WHETHER DIRECTORS LIABLE TO TAKE UP MEMBER'S SHARES

Rayfield *v.* Hands and Others

Vaisey, J. 2nd April, 1958

Action.

The plaintiff was a shareholder in a company, art. 11 of the articles of association of which required him to inform the directors of his intention to transfer shares in the company and which provided that the directors " will take the said shares equally between them at a fair value." In accordance with the articles, the plaintiff notified the directors, who contended that they need not take and pay for the plaintiff's shares, on the ground that the articles imposed no such liability upon them. The plaintiff claimed for the determination of the fair value of his shares, and for an order that the directors should purchase such shares at a fair value.

VAISEY, J., said that the defendants contended that the words " the directors will take the said shares " imported the idea of an option, but in this context the word " will " indicated a resultant prospective eventuality in which the member had to sell his shares and the directors had to buy them, each being under an obligation to bring that eventuality into effect. There was thus in the language of art. 11 a mutual obligation. The next point taken by the defendants was that art. 11, as part of the company's articles of association, did not create a contractual relationship between the plaintiff as shareholder and vendor and the defendants as directors and purchasers. This depended on s. 20 (1) of the Companies Act, 1948. The question arose whether the terms of art. 11 related to the rights of members *inter se* or whether the relationship was between a member as such and directors as such. In his lordship's judgment the relationship here was between the plaintiff as a member and the defendants not as directors but as members, and that this was a contract or quasi-contract between members. The last point was that the notional signing and sealing of the articles created a contractual relation between the company on the one hand and the corporators (members) on the other, so that no relief could be obtained in the absence of the company as a party to the suit. On considering the authorities his lordship was satisfied that it was not necessary, for the plaintiff to succeed, that he should join the company as a party in addition to the directors. Declaration accordingly.

APPEARANCES: *R. B. S. Instone* (*Simpson, Palmer & Winder*); *Michael Albery*, Q.C., and *Paul Baker* (*Mark Lemon*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[2 W.L.R. 851**

Queen's Bench Division

INDUSTRIAL INJURIES BENEFIT: WHETHER LEGS " PAIRED ORGANS "

R. *v.* Medical Appeal Tribunal for South Wales District; *ex parte* Griffiths

Lord Goddard, C.J., Hilbery and Donovan, JJ. 16th April, 1958

Application for certiorari.

The applicant's left leg was injured during the First World War. In 1955, his right leg was injured in an accident at work, resulting in disablement within the meaning of the National Insurance (Industrial Injuries) Act, 1946. The medical appeal tribunal, in assessing his disablement, did not take into account the injury to the left leg. The applicant applied for an order of certiorari to quash the tribunal's decision on the ground that in assessing the disability to the right leg they failed to make an assessment of the disability to the left leg as required by reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948.

LORD GODDARD, C.J., said that the only question that was submitted to the court was whether legs were to be regarded as " paired organs," that was to say " one of two similar organs, the functions of which would be inter-changeable or complementary " within reg. 2 (5). As far as the Divisional Court was concerned, it seemed that the case was entirely governed by *R.* v. *Medical Appeal Tribunal at London; ex parte Burpitt* [1957] 2 Q.B. 584, in which it was held that hands were organs and fingers of one hand which had been injured in an accident were similar organs within the regulation. It followed that if a hand was an organ, a foot was an organ; if a hand was an organ an arm was an organ; if an arm was an organ a leg was an organ. The order of certiorari had to go on the ground that legs were " paired organs " and therefore a separate assessment had to be made in respect of the left leg as well as an assessment in respect of the right leg.

HILBERY, J., and DONOVAN, J., agreed.

APPEARANCES: *G. G. Baker*, Q.C., and *Norman Francis* (*Botterell & Roche* for *T. S. Edwards & Son*, Newport, Monmouth); *Rodger Winn* (*Solicitor, Ministry of Pensions*).

[Reported by Miss C. J. ELLIS, Barrister-at-Law] **[1 W.L.R. 517**

Court of Criminal Appeal

CRIMINAL LAW: HIRE PURCHASE: LEGAL REQUIREMENTS NOT COMPLIED WITH: WHETHER MENS REA NECESSARY

R. *v.* St. Margarets Trust, Ltd.

R. *v.* Oliver Autos, Ltd.

R. *v.* Richard

R. *v.* Hone

Lord Goddard, C.J., Donovan and Havers, JJ. 21st April, 1958

Appeals against convictions.

A motor-car company accepted less than 50 per cent. of the cash price, which was the required deposit for the sale of a motor-car on hire-purchase terms. A falsely inflated cash price having been inserted in the hire-purchase agreement, a finance company advanced a higher sum than they would have done had they known of the true cash price, and the excess over the true cash price was used by the motor-car company to make up the deficiency between the deposit paid and the 50 per cent. of the true cash price. The finance company, who were unaware that 50 per cent. of the purchase price had not been paid by the purchaser, were charged with an offence in that they disposed of the motor-car, i.e., parted with the right to possession under circumstances which contravened art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, which provides: " A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement . . . unless the requirements specified in the second schedule hereto are or have been satisfied in relation to that agreement." Schedule II requires, *inter alia*, that certain specified percentages of the cash price of the goods must be paid before the signing of the agreement. In the case of " mechanically propelled vehicles " 50 per cent. is specified. The motor-car company and two of its officers were charged with aiding and abetting the offence. They were all convicted.

DONOVAN, J., reading the judgment of the court, said that the trial judge had upheld the prosecution's contention that the prohibition contained in art. 1 was absolute in the sense that if a prohibited transaction was entered into an offence was committed even if the person concerned did so innocently. The appellants contended that the article should be construed so as not to apply where the act was done innocently and relied on the presumption that *mens rea* was essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatived that presumption. The court thought that Kennedy, L.J., in *Hobbs* v. *Winchester Corporation* [1910]

2 K.B. 471, at p. 483, was saying that modern statutes created offences where knowledge on the part of an offender was not essential, and that accordingly there was no universal prior presumption of *mens rea*. Each statute had to be construed according to its terms and object. There was no difference for present purposes between a statute and a statutory instrument and the question for determination was whether the words of art. 1 considered together with the object of the order made the prohibited act an offence, even though the doer of the act had no guilty mind. The words of the order were an express and unqualified prohibition of the acts done by the finance company. The object of the order was to help defend the currency against the peril of inflation. It would not be at all surprising if Parliament, to prevent calamities, enacted measures which it intended to be absolute prohibitions of acts which might increase the risk. The court thought that art. 1 should receive a literal construction and that the trial judge's ruling was correct. Appeals dismissed.

APPEARANCES: *Gerald Gardiner*, Q.C., and *J. C. Lawrence* (*Dennison, Horne & Co.*); *S. C. Silkin* (*Lewis Silkin & Partners*); *F. H. Lawton*, Q.C., and *Neville Faulks* (*Solicitor*, Board of Trade).

[Reported by Miss C. J. ELLIS, Barrister-at-Law] **[1 W.L.R. 522**

IN WESTMINSTER AND WHITEHALL

ROYAL ASSENT

The following Bills received the Royal Assent on 30th April:—

Life Peerages
Mersey Docks and Harbour Board
Milford Haven Conservancy
National Health Service Contributions
Road Transport Lighting (Amendment)
Tyne Improvement

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Defence Contracts Bill [H.C.] [1st May.
Gloucester Corporation Bill [H.C.] [29th April.
Industrial Assurance and Friendly Societies Act, 1948 (Amendment) Bill [H.C.] [29th April.
Land Powers (Defence) Bill [H.C.] [30th April.
Park Lane Improvement Bill [H.C.] [1st May.
Slaughterhouses Bill [H.C.] [30th April.

Read Second Time:—

Clergy Orphan Corporation Bill [H.L.] [30th April.
Essex County Council Bill [H.C.] [30th April.
Prevention of Fraud (Investments) Bill [H.L.] [29th April.
Statute Law Revision Bill [H.L.] [29th April.

Read Third Time:—

Christmas Island Bill [H.L.] [1st May.
Coventry Corporation Bill [H.L.] [29th April.
Water Bill [H.L.] [1st May.

In Committee:—

Land Drainage (Scotland) Bill [H.C.] [1st May.
Tribunals and Inquiries Bill [H.L.] [29th April.

HOUSE OF COMMONS

PROGRESS OF BILLS

Read First Time:—

Pier and Harbour Provisional Order (Margate) Bill [H.C.] [1st May.

To confirm a Provisional Order made by the Minister of Transport and Civil Aviation under the General Pier and Harbour Act, 1861, relating to Margate.

Race Discrimination Bill [H.C.] [30th April.

To make illegal discrimination to the detriment of any person on the grounds of colour, race and religion in the United Kingdom.

Sale of Milk Bill [H.C.] [2nd May.

To provide for the sale of milk made up in a container holding one-third of a pint; and for purposes connected therewith.

Read Second Time:—

Distribution of Industry (Industrial Finance) Bill [H.C.] [30th April.
London County Council (Money) Bill [H.C.] [28th April.

Read Third Time:—

Corporation of the Sons of the Clergy Bill [H.C.] [2nd May.
First Offenders Bill [H.C.] [2nd May.
Matrimonial Proceedings (Children) Bill [H.C.] [2nd May.
Litter Bill [H.C.] [2nd May.
Reading Almshouses and Municipal Charities Bill [H.C.] [2nd May.
Royal Institution of Great Britain Charity Bill [H.C.] [2nd May.
St. James's Dwellings Charity Bill [H.C.] [2nd May.

STATUTORY INSTRUMENTS

Additional Import Duties (No. 3) Order, 1958. (S.I. 1958 No. 671.) 5d.

Colne Valley Water Order, 1958. (S.I. 1958 No. 664.) 4d.

Electricity (Superannuation Scheme) (Winding Up) Regulations, 1958. (S.I. 1958 No. 692.) 5d.

Exchange of Securities (No. 2) Rules, 1958. (S.I. 1958 No. 706.) 6d.

Hired Vehicles (Temporary Importation) Regulations, 1958. (S.I. 1958 No. 666.) 5d.

Importation of Potatoes from Germany Order, 1958. (S.I. 1958 No. 704.) 5d.

Milk (Great Britain) Order, 1958. (S.I. 1958 No. 708.) 6d.

Milk (Northern Ireland) Order, 1958. (S.I. 1958 No. 709.) 5d.

National Assistance (Appeal Tribunals) Amendment Rules Confirmation Instrument, 1958. (S.I. 1958 No. 714.) 5d.

National Health Service (Remission of Dental Charges) Order, 1958. (S.I. 1958 No. 707.) 4d.

National Insurance (Determination of Claims and Questions) Amendment Regulations, 1958. (S.I. 1958 No. 701.) 5d.

National Insurance (Industrial Injuries) (Determination of Claims and Questions) Amendment Regulations, 1958. (S.I. 1958 No. 702.) 5d.

Perth and Kinross Fire Area Administration Amendment Scheme Order, 1958. (S.I. 1958 No. 681 (S.31).) 5d.

Stopping up of Highways (County of Kent) (No. 7) Order, 1958. (S.I. 1958 No. 657.) 5d.

Stopping up of Highways (City and County Borough of Liverpool) (No. 1) Order, 1958. (S.I. 1958 No. 683.) 5d.

Stopping up of Highways (County of Nottingham) (No. 1) Order, 1958. (S.I. 1958 No. 686.) 5d.

Stopping up of Highways (County of Sussex, East) (No. 4) Order, 1958. (S.I. 1958 No. 684.) 5d.

Stopping up of Highways (City and County Borough of Worcester) (No. 1) Order, 1958. (S.I. 1958 No. 682.) 5d.

Swansea–Manchester Trunk Road (Ruabon By-Pass and Wrexham By-Pass) Order, 1958. (S.I. 1958 No. 658.) 5d.

Widmerpool–Nottingham–Bawtry–Goole–Howden Trunk Road (Arnold By-Pass) Order, 1958. (S.I. 1958 No. 685.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, Prices stated are inclusive of postage.]

NOTES AND NEWS

Honours and Appointments

Mr. H. G. TALBOT and Mr. N. F. M. ROBINSON have been appointed chairman and deputy chairman respectively of the Court of Quarter Sessions for the county of Derby; Mr. W. L. BURN has been appointed chairman of the Court of Quarter Sessions for the county of Durham; and Mr. A. C. BULGER has been appointed deputy chairman of the Court of Quarter Sessions for the county of Gloucester.

Mr. J. W. D. AMBROSE, Official Assignee, Singapore, has been appointed a Puisne Judge in Singapore.

Mr. WILLIAM HARRISON OPENSHAW has been appointed Recorder of the Borough of Preston and Judge and Assessor of the Borough Court of Pleas.

Sir STAFFORD FOSTER SUTTON, K.B.E., C.M.G., has been appointed President of the Pensions Appeal Tribunals for England and Wales in succession to Sir Owen Beasley, C.B.E., who is retiring after fifteen years' service with the tribunals.

Miscellaneous

The Master, Mr. J. S. Chown, presided at the annual livery dinner of the Solicitors' Company held at the Mansion House on 2nd May. The Lord Mayor and the Sheriffs, and the French Ambassador were present.

SURREY DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved, with modifications, the Surrey Development Plan.

The following candidates were successful in The Law Society's Honours Examination, held in March, 1958:—FIRST CLASS: D. S. Lees, LL.B. (London). SECOND CLASS: P. R. Bromage, B.A. (Cantab.); R. E. Crawford, M.A., LL.B. (Cantab); T. R. Dibley; S. B. Edell, LL.B. (London); P. T. Ely; H. Fayers, LL.B. (London); C. L. Gold, LL.B. (Leeds); B. S. Norton; A. C. J. Phillips; P. Walthall, LL.B. (Manchester). THIRD CLASS: H. Beckwith, LL.B. (Leeds); G. K. Bird, B.A. (Cantab.); W. Bogan; D. A. Capper, LL.B. (Liverpool); D. E. Clarke; J. F. Coleman; P. J. Davies; A. G. Dunford; D. D. Edwards; J. C. Forster, B.A., LL.B. (Dublin); D. Gellhorn; E. W. Huck, LL.B. (London); M. M. Pettit, B.A. (Oxon); G. N. Pollard; A. M. Tweedy; T. Walker, B.A. (Cantab.).

The Council of The Law Society have accordingly given class certificates and awarded the following prize: To *Mr. Lees:* The Clement's Inn Prize—value £48.

The Council have given class certificates to the candidates in the second and third classes.

Seventy-two candidates gave notice for Examination.

THE SOLICITORS ACT, 1957

On 10th April, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of ARTHUR LLOYD PARRY, of No. 3, Augusta Street, Llandudno, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

On 10th April, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of ALFRED ASHFORD, of No. 92, Tweedy Road, Bromley, Kent, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

On 10th April, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of WILLIAM DAVID PICTON, of Bellevue Chambers, Tenby, Pembrokeshire, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

BRADFORD, HUDDERSFIELD AND LEEDS RENT TRIBUNALS

The existing rent tribunals at Bradford and Huddersfield have been closed and the tribunals amalgamated with the Leeds Tribunal. The office of the new tribunal will be at Carlton Chambers, 84 Albion Street, Leeds, 1; Telephone number, Leeds 23671.

The tenth series of annual summer courses in law will be held at the City of London College from 21st July to 15th August. The series consists of three courses, two on English law and comparative law, and one on international law. The courses, which are under the direction of Dr. Clive M. Schmitthoff, barrister-at-law, are arranged for lawyers and law students from abroad and are likewise suitable for English students preparing for the study of law. The course in English law and comparative law is divided into two study groups: the syllabus of study group A is designed for those who wish to acquire a knowledge of modern English law; the syllabus of study group B includes subjects of particular interest to those who have some knowledge of Anglo-American common law. The course in international law includes topics of international mercantile law, private and public international law. In addition to the lectures, seminars are held in which legal institutions of particular interest are discussed from the viewpoint of comparative law. Special talks on matters of topical interest are provided, and during the afternoons and at week-ends inexpensive trips are arranged to places in and around London. Prospectuses of both courses can be obtained from the Secretary, The City of London College, Moorgate, London, E.C.2.

Wills and Bequests

Mr. A. P. Coode, solicitor, of St. Austell, Cornwall, left £66,361 net.

Major L. E. Eardley-Simpson, solicitor, and former Under-Sheriff, Derbyshire, left £92,051 net.

Mr. J. Hincks, solicitor, of Wigston Magna, Leics, left £38,478 net.

Mr. John Salter Stooke-Vaughan, solicitor, of Stowmarket, Suffolk, left £151,102 (£147,121 net).

SOCIETIES

The next quarterly meeting of the LAWYERS CHRISTIAN FELLOWSHIP will be held at the Law Society's Hall, Bell Yard, London, W.C.2, on 15th May, at 6.30 p.m. Tea will be available from 5.30 p.m. The meeting, to which all lawyers, law students and visitors are warmly welcomed, will be addressed by Mr. Douglas P. Blatherwick, O.B.E., solicitor, of Newark, and former vice-president of the Methodist Conference, on the subject of "The Spiritual Responsibility of the Layman."

The toast of "Her Majesty's Judges," to which Judge M. R. B. Shepherd responded, was proposed by Mr. W. M. Maddock, vice-president of the Incorporated Law Society of Plymouth, at the annual dinner of the PLYMOUTH LAW STUDENTS' SOCIETY held on 18th April.

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